

# FRONTLINE



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OFFICE OF MISSOURI ATTORNEY GENERAL

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## 9 law enforcement-related bills signed

Several bills impacting law enforcement have been signed into law. Unless indicated, they take effect on Aug. 28.

### SEX OFFENSES

**SB 714** makes significant changes to sex offense laws:

- Substantially updates the sex offender registration requirements, including a provision that adds certain juvenile sex offenders to the adult sex offender registry.
- Allows certain out-of-court juvenile statements to be admitted into evidence in child pornography prosecutions.
- Increases criminal penalties for child pornography

and other sex offenses.

- Allows the Cyber Crime Investigation Fund to be accessed by prosecuting attorneys for training in prosecuting these cases.

### SALES

**SB 724** creates a real-time electronic tracking system for sales of pseudoephedrine products and creates a rebuttable presumption that the buyer whose name is listed in the pharmacy's logbook is the buyer of the

product. These provisions take effect on Jan. 1, 2009.

### HARASSMENT, STALKING

**SBs 818 & 795** updates the harassment and stalking laws to more explicitly include electronic communications. The legislation also requires school officials to report incidents of harassment or stalking to appropriate law enforcement officials.

SEE **BILLS SIGNED**, Page 2



### LEGISLATIVE UPDATE

### GO TO WEB FOR BILL PROVISIONS

To check on a bill's provisions, go to [www.senate.mo.gov](http://www.senate.mo.gov) for Senate bills and [www.house.mo.gov](http://www.house.mo.gov) for House bills.

## Fallen officers remembered at memorial ceremony



The Law Enforcement Memorial Ceremony drew officers from around Missouri who paid honor to their fallen comrades.

Law enforcement officers from around Missouri gathered in Jefferson City on May 3 to remember their fallen comrades during the 20th annual Law Enforcement Officers Memorial Service.

The names of eight Missouri officers were added to the Law Enforcement Memorial on the north side of the state Capitol: officers Norvelle Brown and Stephen Jerabek; deputy sheriffs Charles Cook, Gary McCormack and Michael Triplett; and chief jailer David Leon Gwin; all of whom died in the line of duty in 2007; as well as Deputy Sheriff Jesse Henderson and Sheriff Charles Stevens, who died in previous years.

**“ This ceremony stands as a reminder that in every decade and every generation, there are those who take on the responsibility for the safety of society – quietly and without fanfare, they face danger every day to protect us. ”**

~ Attorney General Jay Nixon

**BILLS SIGNED INTO LAW:** CONTINUED FROM PAGE 1**TRAFFIC LAWS****SBs 930 & 947** makes

several changes to the traffic laws, including laws relating

to commercial vehicles. The legislation clarifies that prior municipal DWI offenses will count toward enhanced penalties for offenders who commit subsequent DWIs.

**INTOXICATION OFFENSES****HB 1715** lowers the maximum blood alcohol content from .10 to .08 for boating. Section 577.023 clarifies that prior municipal DWI offenses will count toward enhanced penalties for offenders who commit subsequent DWIs and took effect on July 3.**SCRAP METAL****SBs 1034 & 802** creates a Class C felony for a person who steals wire or pipe used to conduct electricity, natural gas or other fuels. The legislation also imposes certain restrictions on transactions involving scrap metal and penalties for failing to adhere to those restrictions and record-keeping requirements.**ILLEGAL IMMIGRATION****HBs 1549 et. al.** makes a variety of changes aimed at illegal immigration. It would provide, subject to appropriation, for the Highway Patrol to enter into a memorandum of understanding with the Department of Homeland Security for enforcement of federal immigration laws.

It also amends the bail provision so that, if a judge reasonably believes that a person incarcerated is not lawfully present, there is

a presumption the person shall not be released until the person provides evidence of his lawful presence to rebut the presumption. The bill creates a crime of assisting another in obtaining a driver's license by fraud.

**SUNSHINE LAW****HB 1450** will extend the sunset clause on two exceptions to the Sunshine Law that allow a public body to close certain records and meetings that relate to terrorist response plans and security systems. The exceptions continue to afford access to the expenditures made for such security systems.**JUVENILE COURT JURISDICTION****HB 1550** extends the jurisdiction of the juvenile court with regard to status offenses (truancy, runaways) from age 17 to age 18. This provision only takes effect when certain state appropriations levels are met to accommodate the increased workload.**Meth360 has free online resources**

The Partnership for a Drug-Free America is offering its meth prevention program, Meth360, at no charge to Missouri law enforcement agencies through its Web site, [www.drugfree.org/meth360](http://www.drugfree.org/meth360).

Meth360 is a community outreach program designed to raise awareness and reduce demand for meth.

The program brings together law enforcement officers and substance abuse prevention and treatment



professionals to co-deliver methamphetamine awareness presentations to parents and concerned citizens at local business and civic organizations, schools and parent groups.

Now operating in 14 states, Meth360 is a turnkey program available to all communities at no charge.

The Web site features a dynamic online training course to prepare presenters to participate in the program, along with downloadable materials.

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## DEFENDANT STATEMENTS, COERCION BY PROMISES

### State v. Brown

No. 27911, Mo.App., S.D., Jan. 3, 2008

Justin Brown represented to law enforcement that he was not involved in a murder, but that he had helped dispose of the body and other evidence, as well as use the victim's ATM card.

During the investigation, the prosecutor wrote a letter setting out an agreement, saying that if Brown was not involved in the killing, and if he gave a detailed written and taped statement about everything he knew, and if he helped police recover the victim's body and any other evidence, then the prosecutor would only charge him with tampering with evidence.

The letter clearly stated that if Brown was the killer, "all deals would be off." It also stated that if Brown lied, the deal would be off.

Brown subsequently made statements to the police that were used at his murder trial. Brown argued that they should be suppressed because the statements were made due to a "promise of leniency."

The appeals court disagreed, noting that Brown was involved in the killing and had lied to the police after signing the deal. The court found there was no coercion in the proffer of leniency.

When the deal was struck, the prosecutor and police did not know the full extent of Brown's involvement, and the letter was clear that Brown had to be truthful and could not have been involved in the murder.

## MIRANDA, INTERROGATION REQUIREMENT, SIXTH AMENDMENT RIGHT TO COUNSEL

### State v. Umphrey

No. 88926, Mo.App., E.D., Oct. 30, 2007

Thomas Umphrey murdered his supervisor, fled to Illinois, murdered a woman for her car, and tried to flee to Canada, but was stopped at the border and arrested for possession of a stolen car.

## UPDATE: CASE LAW

Opinions can be found at [www.findlaw.com/casecode/](http://www.findlaw.com/casecode/)

He was arraigned on a fugitive warrant in Minnesota and assigned counsel for extradition proceedings. After the arraignment, Umphrey was returned to jail.

According to Umphrey, he asked to speak to his attorney, but was told he first had to speak with other officers. That evening, detectives from St. Louis read him the Miranda warnings, and after waiving his rights, Umphrey admitted to killing his supervisor.

### Miranda, interrogation requirement:

On appeal, Umphrey argued that his waiver was invalid under the Fifth Amendment. While there was no question that Umphrey was in custody, he was not being interrogated, nor did he have reason to believe interrogation was imminent when he purportedly requested to speak to his appointed attorney.

Umphrey's request was not made in the context of questioning, but only because the judge had given him the phone number for his attorney. Thus, there was no violation of Umphrey's Fifth Amendment rights when the St. Louis officers questioned him.

**Right to counsel:** Umphrey also argued that his Sixth Amendment right to counsel had attached at the extradition arraignment.

The appeals court found that the extradition proceeding was not "substantively an arraignment" and did not signify the initiation of adversary judicial proceedings such that would cause Sixth Amendment rights to attach.

Charges were not read to Umphrey and he did not make a plea. In fact, Missouri had not even filed a criminal complaint at the time of the Minnesota extradition arraignment. The mere fact that Minnesota referred to this proceeding as an "arraignment" did not trigger Umphrey's Sixth Amendment rights.

## SIXTH AMENDMENT RIGHT TO COUNSEL

### State v. Dykes

No. 89881, Mo.App., E.D., Nov. 13, 2007

Harold Dykes was charged with felony stealing by deceit. On June 15, 2006, the trial court authorized a St. Louis police detective to interview Dykes on matters "not related to the charges pending against the defendant."

On June 23, the detective and an assistant circuit attorney (who was not authorized to speak with Dykes) met with Dykes, who had been indicted, was represented by counsel and was awaiting trial.

The detective claimed his intent was to see if Dykes would be able to identify unknown suspects and gain information about other similar crimes. Those crimes were "strikingly similar" to the one with which Dykes was charged. Dykes' attorney was not informed.

Dykes waived his Miranda rights and agreed to talk, but refused to sign anything or make an audiotaped statement. Dykes made several incriminating statements that the state later sought to admit in Dykes' trial. The statements were about past uncharged crimes that were purportedly so unique that they constituted evidence of Dykes' intent, identity and lack of mistake in connection with the charged crime.

Dykes' statements were suppressed because his Sixth Amendment rights had attached. The trial court's order allowing the interview may have left Dykes with the impression that none of the information could be used against him.

The assistant circuit attorney "certainly would have been aware" that any statements made during the interview could likely be incriminating because she knew the subject of the interview was similar to the pending case. Thus, the state had an affirmative obligation to preserve and respect Dykes' right to counsel.

## SEARCH AND SEIZURE, TRAFFIC STOPS, WARRANTLESS SEARCHES

### State v. Bones

No. 28011, Mo.App., S.D., Aug. 20, 2007

After stopping Nelson Cruz Bones for a traffic violation, the officer recognized him from when he was present at two or three homes that were searched for narcotics and weapons found.

After obtaining Bones' license and vehicle title, the officer checked for warrants and found none. The officer called for backup and returned to Bones' car and asked him to exit it. The officer performed a pat-down search of Bones' front waist area and felt a hard, long object. Fearing it might be a weapon, the officer reached for his handcuffs. Bones then fled, and an object fell from his waistband. It was a cylinder containing meth.

**Length of traffic stop, reasonable suspicion to extend stop:** On appeal, Bones argued he was illegally detained beyond the time necessary to complete the stop. He said once the officer had checked for warrants, he should have let him leave.

But the court disagreed, finding that the traffic stop was not complete because the officer had not yet issued a ticket and returned Bones' license and registration. The court further noted that the officer had not used an unreasonable amount of time to check his information, and had not unreasonably extended the stop by asking Bones to exit his vehicle.

**Pat-down searches:** Bones also argued that there was no basis for a pat-down search since the officer had no reason to believe he was armed and dangerous. The court disagreed, finding that the officer's familiarity with the defendant's past involvement with drugs and weapons "gave him a 'reasonable, particularized suspicion' that defendant may be armed."

## UPDATE: CASE LAW

### State v. Kempa

No. 28014, Mo.App., S.D., 2007

Cpl. Gary Braden, a canine officer with the Highway Patrol, saw a car with Arizona plates going 76 mph on I-44 in Lawrence County. The car tires crossed the fog line and traveled about one foot onto the shoulder twice within a few seconds.

Braden began to follow and, running a license plate check, learned the car was owned by an Arizona car rental agency. Braden activated his emergency lights, but Luke Kempa never slowed, driving onto the shoulder and then back into the driving lane.

Kempa eventually stopped on the shoulder of an exit ramp. He immediately exited his car and walked toward Braden. Braden noted that Kempa was visibly shaking and avoided eye contact.

After reviewing the rental agreement, Braden asked Kempa to sit in the patrol car. As Braden did a routine record check, he asked Kempa where he was going.

Kempa said he was going to St. Louis to attend his brother's girlfriend's wedding. Because of Kempa's odd story, lack of wedding clothing in his car, and the fact that illegal contraband is often transported along I-44, Kempa suspected criminal activity.

When Braden asked Kempa if there was clothing in the truck; he did not reply. Braden asked if there was anything illegal in the trunk; again, no reply. Braden asked for permission to search the car, and Kempa said, "You can look around in my vehicle." When Braden asked to search the trunk, Braden said he did not have a key.

The record check revealed Kempa had a valid driver's license and a prior drug conviction. Since Kempa did not consent to a search of the trunk, Braden conducted a canine sniff. About 10 minutes had now elapsed in the stop. No warnings had been issued to Kempa, nor

had they been entered into the Highway Patrol computer system.

Braden's dog indicated there were drugs in the trunk — 178 pounds of marijuana.

On appeal, Kempa challenged the validity of the search. The court found that the investigatory phase of the stop was still ongoing because no warning or citation had been issued. Also, when Braden received the results of the record check, he knew Kempa had failed to stop immediately and immediately exited his car when he did stop; was excessively nervous; was traveling from a known drug source area to a known drug destination area in a rental car over a short time frame; had no wedding attire; and had a prior drug conviction.

Braden also knew Kempa's excuse for why it took so long to stop was unfounded; his reason for the trip made no sense; and he failed to say what was in the trunk and claimed he did not have the trunk key.

These facts supported an "objectively reasonable suspicion" that Kempa was involved in criminal activity and justified a continued detention. And since the dog sniff occurred prior to the end of the stop, that could be considered as well.

## LAY OPINIONS

### State v. Bivines

No. 65811, Mo.App., W.D., Sept. 11, 2007

Lorne Bivines was captured on a camera surveillance tape at a school he burglarized. The tape malfunctioned and the crime lab was unable to fix it. Police had paused the tape and taken photos of the paused screen. They were introduced into evidence, but the poor quality made it difficult to distinguish facial features.

At trial, over defense objection, two police officers testified they had viewed the tape and could identify Bivines. They also testified they had prior dealings with Bivines and were familiar with him. Since the officers testified they had prior dealings with Bivines, their testimony was admissible as a lay opinion.

**DRIVING WHILE REVOKED****Nelson v. State**

No. 88797, Mo.App., E.D., Feb. 26, 2008

Ronnie Nelson never had a driver's license, but he continued to drive. Law enforcement stopped him several times, and the director of revenue revoked his driving privilege several times. In fact, Nelson had prior convictions for driving while revoked and driving while intoxicated.

Nelson ultimately was charged with five counts of driving while his driving privilege was revoked, to which he pleaded guilty.

On appeal, Nelson argued there was no factual basis for his guilty pleas to driving while revoked because since he never had a driver's license, his driving privilege had never been revoked.

The appeals court held that a "driving privilege" does not refer only to a vested privilege to drive that exists by virtue of a driver's license. Rather, the term "driving privilege" also refers to the "potential unvested privilege to seek licensure."

The court noted that § 302.321 defines the crime of driving while revoked as where one operates a vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked. If a driving privilege only existed when one was licensed, then the statutory language is redundant. Thus the legislature must have intended to distinguish a license from a driving privilege.

**MEDICAL NECESSITY OF MARIJUANA****State v. Cox**

No. 67832, Mo.App., W.D., Jan. 2, 2008

Robert Cox was not allowed to present evidence of his medical need for marijuana to relieve pain and suffering from a spinal cord injury. The court of appeals upheld this ruling, holding that there was not a medical necessity defense to possession of a controlled substance.

**UPDATE: CASE LAW****EXPERT TESTIMONY****State v. Foster**

No. 28068, Mo.App., S.D., Feb. 14, 2008

The appeals court reversed Randall Foster's child molestation, statutory sodomy and child endangerment convictions on the ground that the state's expert, a SAFE examiner, bolstered the victim's credibility.

During opening statements, the prosecutor told jurors that the expert, despite finding no physical evidence of abuse, found the victim to be "very credible." The expert testified that in 90-95 percent of cases no physical evidence of abuse is found. But he explained that in most of these cases, abuse actually occurred despite no physical findings. He also said he had a "sense" whether a child was lying. He then testified that the victim in this case had "good insight" into lying and its consequences.

The court ruled this testimony went beyond admissible "profile" testimony about behaviors commonly observed in sexual abuse victims, and instead constituted opinion testimony about the victim's credibility or truthfulness.

**DESTRUCTION/RETENTION OF EVIDENCE, SECTION 490.733****State v. Michael**

No. 88104, Mo.App., E.D., Aug. 7, 2007

Byron Paul Michael challenged his convictions for manufacturing and possession of meth and for possession of ephedrine and drug paraphernalia with intent to manufacture meth on the ground that the hazardous materials found by police during their search (anhydrous ammonia, ether and a hydrogen generator) were destroyed in violation of § 490.733, RSMo. It requires police to retain representative samples of hazardous material evidence and obtain court approval before destroying it.

The court rejected this argument on the ground that Michael had stipulated that the items recovered were commonly used to make meth and that § 490.733 neither required the exclusion of evidence regarding the existence of hazardous materials, nor specified any other sanction or remedy, if the police did not collect or retain such evidence in the manner provided under this statute.

**DWI, SUFFICIENT EVIDENCE****State v. Ollison**

No. 66722, Mo.App., W.D., Sept. 11, 2007

The court reversed James Ollison's DWI conviction because of insufficient evidence proving he was intoxicated at the time of driving.

An officer discovered Ollison's empty truck overturned in a ditch near a sharp curve at 1:33 a.m. Two bystanders told the officer Ollison had called them, saying he had been in an accident.

The officer eventually located Ollison at his in-laws' house, where he noticed Ollison stumbling and slurring his speech. He also failed each field-sobriety test the officer had him perform.

At 2:40 a.m., the officer gave Ollison a portable breath test, which showed a blood alcohol content of .154 percent. Almost 30 minutes later at the police station, a breath test showed his BAC was .168 percent.

Since Ollison's accident occurred at a time and location remote from his arrest, the court held that the state had to prove how much time had expired between driving and Ollison's conduct that led the officer to believe he was drunk.

Although Ollison had admitted that he drank five beers before driving and none after the accident, the court, relying on the proposition that it takes 30-90 minutes for alcohol to be absorbed into the bloodstream, held that the state had failed to prove Ollison was drunk at the time of driving.



July 2008

## FRONT LINE REPORT

ago.mo.gov

# Report flood, storm scams to Attorney General

In the wake of record flooding in northeast Missouri in June, local law enforcement should contact the Attorney General's Consumer Protection Division with reports of any scams related to floods, tornadoes or other natural disasters, or direct consumers to file scam complaints with the office.

The Attorney General has taken action against con artists who exploit natural disasters to take advantage of those needing home and other property repair.

To contact the Attorney General's Office about such scams, go online or call the Consumer Protection Hotline.

**To report scams:**

Click [ago.mo.gov](http://ago.mo.gov)  
OR  
Call 800-392-8222



Residents in Jefferson City escaped severe flooding around the Missouri River and other waterways. The state Capitol can be seen from the Carl R. Noren Access area, which experienced high waters, but not the record-setting levels in 1993 that closed the bridge.